PERNAS CONSTRUCTION SDN BHD

v.

SYARIKAT RASABINA SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ARIFIN ZAKARIA JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-02-754-2000]
20 APRIL 2004

CONTRACT: *Building contract - Breach - Defendant/main contractor instructed plaintiff/sub-contractor to stop work on project - Whether defendant in breach of sub-contract - Mutual termination agreement subsequently entered into by both parties - Whether invalid - Grounds for stop work order - Whether an excuse by defendant to discharge from contract - Plaintiff's claim for work done - Whether defendant should satisfy claim - Sum retained by defendant under performance bond - Whether justified*

This was an appeal by the defendant company (the appellant herein) against the decision of the trial judge who gave judgment in favour of the plaintiff company (the respondent herein). The defendant was the main contractor of a government project for the construction and completion of a secondary vocational school ('the project'). The plaintiff was the defendant's sub-contractor appointed under a sub-contract ('the sub-contract') pursuant to a principal contract between the defendant and the government. The plaintiff commenced work soon after the sub-contract was executed. Subsequently, the defendant instructed the plaintiff to stop work on the project site on the grounds that the piling works were not properly done and not up to standard. Both parties then executed a mutual termination agreement ('the termination agreement') whereby the plaintiff was relieved from further performance of the sub-contract. Under the termination agreement, it was agreed that the defendant would pay the plaintiff the amount outstanding for works done. The defendant, however, did not make the payment on the ground that the claim by the plaintiff was excessive. Instead, the defendant made a call for the performance bond in the sum of RM1,074,477.83 that had been procured by the plaintiff from an insurance company as a guarantee for the due performance of the sub-contract. That led to the plaintiff's action against the defendant in the trial court that resulted in favour of the plaintiff and ended in this appeal. In its defence, the defendant claimed that the plaintiff had delayed the completion of the project and its call on the performance bond was for losses arising out of the works done by the plaintiff on the project.

Held (dismissing the appeal by majority):
Per Mohktar Sidin JCA (Hashim Yusoff JCA concurring)

[1] When the defendant gave the instruction to the plaintiff to stop piling works, the instruction also applied to all other works of the building concerned. If it was proved that the piling works were defective and not up to standard then the structure of the whole building would be unsafe. It would then be useless for the plaintiff to continue working on the other parts of the building. Therefore, it was clear that the reason for the defendant contending the other works were supposedly to continue was to shift the blame onto the plaintiff on the grounds of delay so as to justify its action in asking the plaintiff to concede to the termination agreement. This was because the reasons to terminate the plaintiff's services on the ground that the piling works were defective and not up to standard were found baseless after the results of the tests on the piling works proved otherwise. (pp 717 h & 718 a)

[2] The evidence showed that as at the date the plaintiff had to stop work, there was no complaint by the defendant of any delay in respect of the works done by the plaintiff. The stop work order was given due to the allegation of defectiveness and that the piling works were not up to standard. There was no allegation of delay. When the third interim payment was presented, there was no complaint or allegation by the defendant of the piling works being defective or not up to standard. In fact, the site architect issued a certificate and recommended that payment be made. Further, it was puzzling that the allegation that the piling works were defective came from the officer of the defendant's main office and not from the site manager or the site architect. The defendant could have made the allegation to find a way out of the sub-contract. Further, the letter by the defendant's consultant stated that the piling works were in order but still the defendant refused the plaintiff's request to continue and complete the construction under the sub-contract. It followed that the plaintiff was pressured to execute the termination agreement because of the defendant's allegation thereof. (pp 719 c-h, 720 a-h & 721 a-e)

[3] The termination agreement was in favour of the defendant. The plaintiff was not given any room to negotiate or refuse the terms and conditions contained therein. The evidence showed that the plaintiff was reluctant to sign the termination agreement as the outcome of the tests on the piling works were not known yet but had signed it on being faced with the threat by the defendant. It followed, therefore, that the termination agreement was invalid and the trial judge was right to disregard the termination agreement. (p 725 c-f)

[4] The delay, if any, was the result of the stop work order by the defendant. The plaintiff acting upon the stop work order suspended all works in respect of the project because the plaintiff took it that the stop work order applied to all works thereof. When the results of the tests were announced about five months later there was already a delay of about five months caused by the defendant's stop work order. Despite this the plaintiff had shown its willingness to complete the project but the evidence showed that the defendant did not allow the plaintiff to complete the project at any cost. Naturally, the defendant would not agree to the costing put up by the plaintiff. It was only fair that the dispute between the parties should be referred to an arbitrator as agreed under the principal contract. (pp 736 e-f & 738 c)

[5] When the defendant made the call for the performance bond, the amount in respect of the valuation and the costing of the project were still in dispute. Clause 11 of the termination agreement clearly stated that the parties must agree to the amount and not to an amount arbitrarily put by the defendant. Also, there was no 21-day notice given to the plaintiff as required. As such, the call for the performance bond was in breach of cl. 11 of the termination agreement and that in itself rendered the termination agreement invalid and ineffective. (pp 738 h & 739 a)

[6] The plaintiff was incorporated not long before they were awarded the sub-contract. In addition thereto, the plaintiff was awarded one or two other contracts. As such, the plaintiff was not really an established and well-known firm. However, it was not disputed that the defendant had reported the plaintiff to the relevant authorities whereby it was not given additional contracts. Therefore, there was evidence that the plaintiff's reputation was injured but the award of RM5 million by the trial judge was rather high. The award should be reduced to RM500,000 only. (p 739 f-g)

Per Arifin Zakaria (allowing appeal in part)

[1] The letter by the defendant directing the plaintiff to stop work on the project with immediate effect did not in fact direct the plaintiff to stop all works on the project. It was plain that the instructions related wholly to piling works only. The plaintiff was at liberty to carry on with all other works on the project. Further, if the defendant had in fact instructed the plaintiff to stop all works as alleged by the plaintiff, then there was no need for the parties to enter into the termination agreement. By signing the termination agreement the plaintiff by implication acknowledged that

the sub-contract still subsisted at the material date. It followed that the letter did not seek to terminate the sub-contract between the plaintiff and the defendant. The finding of the trial judge that the letter had the effect of terminating the sub-contract was erroneous and therefore ought to be set aside. (pp 743 g-h, 744 a-h & 745 a)

[2] In law where neither party has performed the whole of its obligations under a contract, the contract may be rescinded by mutual agreement. By para. 1 of the termination agreement, it was unequivocally stated that the plaintiff agreed to a mutual termination of the sub-contract subject to the terms and conditions therein. The effect of this was that the sub-contract was rescinded and the parties bound by the terms and conditions of the termination agreement. Henceforth, any claim between the parties was governed by the termination agreement and not by the sub-contract. (pp 745 f-h & 746 a-b)

[3] The plaintiff, in principle, should be paid for work done. If the amount claimed was excessive, the defendant should come up with its own measurement or adduce evidence to show otherwise. There was no such evidence before the court. (p 747 h)

[4] As provided by cl.11 of the termination agreement, the performance bond was to be held merely as collateral by the defendant to recover any sum of money owed by the plaintiff to the defendant. Therefore, the defendant could only retain the sum if it satisfied the court that the plaintiff owed the sum or an amount in excess thereof. The defendant failed to adduce such evidence except to state that its costing showed that the cost of completing the project was far in excess of the contract price. There was no evidence to show the final cost of the project even though the project had been completed and the final cost could be ascertained at the date of the trial. In the circumstances, although the defendant had the right to make the call for the performance bond, it had no right to retain the money claimed thereunder. (pp 752 h & 753 a)

[5] The plaintiff's claim for loss of business failed for want of proof. It is trite law that in a claim for damages, the burden is on the party claiming such damage to prove the same. The award of RM5 million granted by the trial judge for loss of business was highly unjustified because it was not supported by the pleadings nor led by the evidence before the court. (pp 755 c & 756 c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh syarikat defendan (perayu di sini) terhadap keputusan hakim bicara yang memberikan penghakiman yang berpihak kepada syarikat plaintiff (responden di sini). Defendan adalah kontraktor utama bagi satu projek kerajaan untuk membina dan menyiapkan sebuah sekolah menengah vokasional ('projek'). Plaintif adalah sub-kontraktor defendan yang dilantik melalui satu sub-kontrak ('sub-kontrak') di bawah kontrak utama di antara defendan dan kerajaan. Plaintif memulai kerja-kerja sebaik sahaja memeterai sub-kontrak. Defendan kemudiannya mengarahkan plaintif supaya memberhentikan kerja di tapak projek dengan alasan bahawa kerja-kerja piling atau penanaman cerucuk tidak dibuat dengan sempurna dan tidak mengikut piawaian. Berikutnya, kedua-dua pihak memeterai perjanjian penamatan bersama ('perjanjian penamatan') di mana plaintif dibebaskan dari semua tanggungjawabnya di bawah sub-kontrak. Di bawah perjanjian penamatan, ianya dipersetujui bahawa defendan akan membayar plaintif bagi jumlah tertunggak bagi kerja-kerja yang telah disempurnakan. Defendan bagaimanapun tidak membuat bayaran tersebut atas alasan bahawa tuntutan plaintif adalah terlalu tinggi. Defendan sebaliknya membuat tuntutan terhadap bon pelaksanaan berjumlah RM1,074,477.83 yang diperolehi oleh plaintif dari syarikat insurans bagi menjamin pelaksaanan sub-kontrak. Ini semua membawa kepada tuntutan plaintif terhadap defendan di mahkamah bicara yang menyebabkan keputusan yang berpihak kepada plaintif dan berakhir dengan rayuan semasa. Dalam pembelaannya, defendan berhujah bahawa plaintif telah melengahkan penyempurnaan projek dan tuntutannya terhadap bon pelaksanaan adalah berdasarkan kerugian yang berbangkit dari kerja-kerja yang dibuat oleh plaintif di projek.

Diputuskan (menolak rayuan melalui keputusan majoriti):
Oleh Mokhtar Sidin HMR (Hashim Yusoff HMR menyetujui)

[1] Apabila defendan memberi arahan kepada plaintif untuk memberhentikan kerja-kerja piling, arahan tersebut merangkum semua kerja-kerja pembinaan lain yang berkaitan. Jika ia dibuktikan bahawa kerja-kerja piling adalah cacat dan tidak mengikut piawaian maka keseluruhan kerangka bangunan menjadi tidak selamat. Maka adalah sesuatu yang sia-sia untuk plaintif meneruskan kerja-kerja di bahagian-bahagian lain bangunan. Adalah dengan itu jelas bahawa alasan bagi hujah defendan yang mengatakan bahawa kerja-kerja lain harus diteruskan adalah untuk mempersalahkan plaintif kerana kelewatan dengan tujuan untuk mewajarkan tindakannya meminta plaintif agar tunduk kepada perjanjian penamatan. Ini kerana sebab-sebab bagi menamatkan perkhidmatan plaintif, iaitu bahawa kerja-kerja piling

adalah cacat dan tidak mencapai piawaian, didapati tidak berasas selepas keputusan-keputusan ujian yang dibuat atas kerja-kerja piling tersebut membuktikan sebaliknya.

[2] Keterangan menunjukkan bahawa pada ketika plaintif memberhentikan kerja-kerja, tiada apa-apa rungutan dibuat oleh defendan berkenaan soal kelewatan kerja oleh plaintif. Perintah memberhentikan kerja telah diberi disebabkan tohmahan tentang kecacatan dan bahawa kerja-kerja piling tidak menepati piawaian. Tidak ada sungutan mengenai kelengahan. Apabila bayaran interim ketiga diserahkan, juga tiada sungutan atau tuduhan dibuat oleh defendan bahawa kerja-kerja piling adalah cacat ataupun tidak menepati piawaian. Malahan, sijil telah dikeluarkan oleh arkitek tapak sekaligus menyokong supaya bayaran dibuat. Selain itu, adalah pelik bahawa tuduhan mengenai kecacatan kerja-kerja piling datangnya dari pegawai ibu pejabat defendan dan bukannya dari pengurus ataupun arkitek tapak. Adalah mungkin bahawa defendan membuat tuduhan bagi mengelak diri dari sub-kontrak. Surat dari konsultan defendan juga menyatakan bahawa kerja-kerja piling adalah teratur tetapi defendan masih enggan membenarkan permintaan plaintif untuk menerus dan menyiapkan pembinaan di bawah sub-kontrak. Ianya mengikut bahawa plaintif telah ditekan untuk memeterai perjanjian penamatan ekoran tuduhan defendan tersebut.

[3] Perjanjian penamatan adalah berpihak kepada defendan. Plaintif tidak diberikan ruang untuk berunding ataupun menolak terma-terma dan syarat yang terkandung di dalamnya. Keterangan menunjukkan bahawa plaintif merasa teragak-agak untuk menandatangani perjanjian penamatan kerana keputusan ujian atas kerja-kerja piling tersebut masih belum diketahui lagi tetapi telah memeterainya juga kerana diugut oleh defendan. Ianya dengan itu mengikut bahawa perjanjian penamatan adalah tak sah dan hakim bicara adalah betul bilamana tidak mengendahkan perjanjian tersebut.

[4] Kelewatan, jika pun berlaku, adalah disebabkan oleh arahan berhenti kerja yang dikeluarkan oleh defendan. Bertindak atas perintah tersebut, dan mempercayai bahawa ia meliputi semua kerja-kerjanya, plaintif telah menggantung semua kerja-kerja diprojek. Apabila keputusan ujian diumumkan lebih kurang lima bulan kemudian, sudah wujud kelewatan selama lima bulan akibat arahan berhenti kerja itu. Walaupun begitu, plaintif masih bersedia untuk menyiapkan projek. Keterangan bagaimanapun menunjukkan bahawa, walau apapun terjadi, defendan berazam untuk menghalang plaintif dari berbuat demikian. Maka adalah tidak menghairankan bahawa defendan tidak bersetuju dengan pengiraan kos yang

dibuat oleh plaintif. Adalah wajar bahawa pertelingkahan di antara mereka dirujuk kepada timbangtara seperti yang dipersetujui di bawah kontrak utama.

[5] Apabila defendan membuat tuntutan terhadap bon pelaksanaan, jumlah berkaitan penilaian dan biaya projek masih lagi dipertikaikan. Fasal 11 perjanjian penamatan dengan jelas memperuntukkan bahawa pihak-pihak hendaklah bersetuju dengan jumlah tersebut tetapi bukan jumlah yang diberikan oleh defendan secara bersendirian. Juga, tidak terdapat notis 21 hari sepertimana yang diwajibkan. Oleh itu, tuntutan terhadap bon pelaksanaan dibuat secara yang memungkiri fasal 11 perjanjian penamatan dan ini sudah mencukupi untuk menjadikan perjanjian penamatan tersebut tak sah dan tak berkesan.

[6] Plaintif telah diperbadankan tidak lama selepas mereka diberikan sub-kontrak. Selain itu, plaintif juga telah diberikan satu atau dua kontrak lain. Oleh itu plaintif bukanlah sebuah syarikat yang sudah berdiri kukuh atau dikenali ramai. Tetapi, ianya juga tidak dinafikan bahawa defendan telah melaporkan plaintif kepada beberapa pihak berkuasa yang berakibat plaintif tidak diberikan beberapa kontrak lain. Dengan itu wujud keterangan bahawa reputasi plaintif telah terjejas. Walaupun begitu, award RM5 juta yang diberikan hakim bicara adalah terlalu tinggi dan ia harus dikurangkan kepada RM500,000 sahaja.

Oleh Ariffin Zakaria HMR (membenarkan rayuan sebahagiannya)

[1] Surat defendan yang mengarahkan plaintif supaya memberhentikan kerja di projek dengan serta merta tidaklah pada hakikatnya mengarahkan plaintif supaya memberhentikan semua kerja-kerja di projek. Ianya jelas bahawa arahan-arahan adalah ditujukan kepada kerja-kerja piling sahaja dan plaintif bebas meneruskan dengan kerja-kerjanya yang lain di projek. Lagipun, jika defendan sebenarnya mengarahkan plaintif supaya memberhentikan semua kerjanya seperti yang dikatakan plaintif, maka tentulah tiada keperluan lagi bagi pihak-pihak untuk memeterai perjanjian penamatan. Dengan memeterai perjanjian penamatan, plaintif secara tidak langsung mengakui bahawa sub-kontrak masih berkuatkuasa pada tarikh berkenaan. Ianya mengikut bahawa surat tersebut tidak menamatkan sub-kontrak di antara plaintif dan defendan. Dapatan hakim bicara bahawa surat itu telah menamatkan sub-kontrak adalah silap dan harus diketepikan.

[2] Di sisi undang-undang, di mana kedua-dua pihak gagal menyempurnakan dengan sepenuhnya obligasi-obligasi mereka di bawah kontrak, maka kontrak tersebut boleh dibatalkan melalui persetujuan bersama. Fasal 1 perjanjian penamatan jelas menyatakan bahawa plaintif bersetuju dengan penamatan sub-kontrak secara bersama tertakluk kepada terma-terma dan

syarat-syarat di dalamnya. Kesan kenyataan ini adalah bahawa sub-kontrak telah dibatalkan dan pihak-pihak terikat dengan terma-terma dan syarat-syarat perjanjian penamatan. Berikutnya, apa jua tuntutan yang dibuat oleh kedua pihak adalah tertakluk kepada perjanjian penamatan dan bukannya sub-kontrak.

[3] Pada prinsipnya plaintif patut dibayar bagi kerja-kerja yang dibuat. Jika jumlah yang dituntut adalah keterlaluan, defendan harus mengemukakan pengiraannya sendiri ataupun menunjukkan keterangan yang sebaliknya. Tidak terdapat apa-apa keterangan sebegitu di hadapan mahkamah.

[4] Sebagaimana yang diperuntukkan oleh fasal 11 perjanjian penamatan, bon pelaksanaan hanyalah dipegang sebagai jaminan dari plaintif bagi membolehkan defendan mendapat kembali wang yang terhutang oleh plaintif kepada defendan. Oleh itu, defendan hanya boleh memegang wang tersebut jika ia dapat memuaskan mahkamah bahawa plaintif telah terhutang kepadanya jumlah tersebut ataupun suatu jumlah yang melebihi jumlah tersebut. Defendan gagal mengemukakan sebarang keterangan mengenainya selain mengatakan bahawa pengiraan biaya yang dibuatnya menunjukkan bahawa kos menyiapkan projek adalah jauh lebih tinggi dari harga kontrak. Tiada keterangan dikemukakan bagi menunjukkan berapakah kos sebenar projek walaupun projek telah disiapkan dan kos sebenar itu boleh dikira pada tarikh perbicaraan. Oleh yang demikian, walaupun defendan mempunyai hak untuk menuntut bon pelaksanaan, ia tidak berhak untuk memegang wang yang dituntut di bawah bon tersebut.

[5] Tuntutan plaintif bagi kerugian perniagaan gagal kerana ketiadaan bukti. Sudah menjadi undang-undang lazim bahawa dalam suatu tuntutan gantirugi, beban adalah atas pihak yang menuntut untuk mengemukakan bukti. Award RM5 juta yang dibenarkan oleh hakim bicara kerana kerugian perniagaan adalah amat tidak berasas. Ia tidak disokong oleh pliding ataupun keterangan di hadapan mahkamah.

Case(s) referred to:

Anuar Mat Amin v. Abdullah Mohd Zain [1989] 3 MLJ 313 ***(refd)***
Bonham – Carter v. Hyde Park Hotel [1948] 64 JLR 177 ***(refd)***
Morris v. Barron & Co [1918] AC 1 ***(refd)***
Perestrello E Companhia Limitada v. United Paint Co Ltd [1969] 1 WLR 570 ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Ross & Frank Co v. JR Crompton & Bros Ltd [1925] AC 445 ***(refd)***

State Government of Peak v. Muniandy [1986] 1 MLJ 490 ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd [1949] 1 All ER 997 ***(refd)***

For the appellant/defendant - Cantius Leo Camoens; M/s C Leo Camoens
For the respondent/plaintiff - CH Foong; M/s LC Chong & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-23-77-91]

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:

The appellant who was the defendant in the court below appealed against the decision of the learned judge in the High Court who gave judgment in favour of the respondent who was the plaintiff in the court below.

According to the statement of claim both the appellant and the respondent are companies incorporated in Malaysia with limited liability. Pursuant to an agreement dated 2 June 1989 (hereinafter referred to as "the sub-contract") the appellant appointed the respondent as their sub-contractor in respect of a project for the construction and completion of the proposed secondary vocational school at Shah Alam, Selangor. It was a term of the sub-contract that the main contract documents made between the appellant and the Government of Malaysia shall be read and construed as part of the sub-contract.The respondent commenced works soon after the sub-contract was executed. For the works the respondent expended certain sums of money for workers, materials and finances on site. Pursuant to the sub-contract agreement, the respondent procured from Universal & General Insurance Sdn Bhd for Security Deposit (Works) dated 29 June 1989 a performance bond in the sum of RM1,074,477.83 guaranteeing the due performance of the sub-contract. On 31 March 1990 the appellant requested the respondent to stop work on the site on the ground that the piling works were not properly done. On 12 May 1990 both the appellant and the respondent came to a mutual termination agreement (hereinafter referred to as the "termination agreement") whereupon the respondent was relieved from further performance of the sub-contract. Under the termination agreement the appellant was to pay the amount due for those works which had been performed and completed by the respondent. The respondent then submitted their claim for the completed works performed but was rejected by the appellant on the ground that it was excessive. The respondent then reduced the claim to RM379,854.51, but the appellant still refused to pay that amount. In addition to the refusal to pay that amount, the appellant requested Universal Life & General Insurance

Sdn Bhd to pay them the sum guaranteed under the performance bond. Universal Life and General Insurance Sdn Bhd complied with the request and duly paid the appellant the sum of RM1,074,477.83. This was done despite the termination agreement entered by the parties. The respondent claimed the calling of the performance bond by the appellant was in breach of the termination agreement. The respondent further claimed that the order to stop work by the appellant was wrongful and was an act of fraud. The respondent claimed that as a result of that they suffered damages. The appellant have also defamed and injured the reputation of the respondent when the appellant ordered the respondent to stop work and terminated the sub-contract.

The appellant in their amended statement of defence did not deny the existence of the sub-contract. The appellant in their statement of defence claimed that the respondent failed to proceed with and execute the works regularly, diligently and expeditiously and voluntarily confessed to their inability to do so. In their statement of defence the appellant claimed that the respondent fell way behind schedule with the works programme thereby making it imminent for the appellant as the main contractor to be unable to complete the works by 27 December 1990, the completion date under the contract and thus they might be liable for liquidated and ascertained damages to be imposed by the Government of Malaysia for delay. The appellant also claimed that the respondent expressed their wishes to be relieved of the contract obligations. The appellant further claimed that the respondent failed and/or neglected to a joint-budgeting or to submit their costing to arrive at a mutually computed budget as provided for in the termination agreement. The appellant in their statement of defence went on to claim that it was provided under the termination agreement that the respondent agreed to bear any loss arising from the completion of the project but limited their liabilities to the value of the performance bond and as such the appellant were entitled to call for the performance bond. The appellant claimed that they suffered damages and losses but ironically there was no counterclaim or set off by the appellant.

The learned judge gave her decision after a full hearing whereby both parties tendered their evidence in court. In her judgment at p. 12 she came to the following decision:

> Oleh hal yang demikian setelah memberi pertimbangan sewajarnya kepada keterangan lisan saksi-saksi dan dokumen-dokumen yang dikemukakan serta hujahan bertulis kedua-dua peguam, saya berpuashati bahawa di atas imbangan kebarangkalian pihak Plaintif telah berjaya membuktikan kes mereka dan juga telah mengalami kerugian kerana kemungkiran kontrak yang disebabkan oleh tindakan-tindakan Defendan. Oleh itu saya telah membenarkan tuntutan Plaintif seperti dipohon …

It is clear to me that the learned judge came to the conclusion that the appellant were at fault when they terminated the sub-contract. From the record, it is clear that the stop work order dated 29 March 1990 given by the appellant to the respondent triggered the whole dispute between the parties. This stop-work order led to the termination agreement.

The undisputed evidence was that until the fourth progress payment the relationship between the parties was cordial when prompt payments were made after the request being made for payments based on the certificates by the site manager. There was no complaint of defective works or any delay by the appellant. In fact, there was no complaint of any delay until the termination agreement was executed. When the certificate for the fourth progress payment was presented by the respondent to the appellant, the appellant refused to pay the amount due under that certificate even though it was certified by the site architect. Instead of paying the amount as stated in that certificate, the appellant wrote to the respondent that they found the piling works by the respondent were faulty. The appellant by a notice dated 29 March 1990 ordered the respondent to stop and suspend work pending the outcome of the tests being carried out by their consultant in respect of the piling works.

It was the contention of the respondent that the order to stop work was in respect of all works under the sub-contract. The learned counsel for the appellant disputed that and stated that the order to stop work was only in respect of the piling and not to other works. The learned judge in her judgment at p. 3 stated as follows:

> Tindakan Defendan yang mengarahkan supaya Plaintif memberhentikan semua kerja-kerja lanjutan kerana dikatakan terdapatnya beberapa kecacatan pada kerja-kerja piling, menurut Plaintif telah disangkal dengan sendirinya oleh Jurutera Projek tersebut yang mengesahkan bahawa kerja-kerja tersebut telah mematuhi piawaian dan keperluan teknikal seperti yang telah ditetapkan. (Sila lihat Eksibit "P-23"). PW1 juga menyatakan bahawa walaupun Jurutera dan Jurukur Bahan Defendan telah diberitahu bahawa kerja-kerja lanjutan boleh disiapkan pada harga kurang RM22 juta iaitu di bawah paras harga kontrak tetapi Defendan masih menyatakan kos sebenar projek tersebut adalah sebanyak RM26 juta dan seterusnya menamatkan kontrak tersebut dengan Plaintif. Plaintif juga mendakwa bahawa semasa Bon Perlaksanaan tersebut dipanggil, mereka tidak menerima apa-apa tuntutan atau notis daripada Defendan.

I agree with the learned judge that when the appellant gave the instruction to stop work on the piling, the instruction also applied to other works in respect of the building. If it is proven that the piling works were defective and not up to the standard then the structure of the whole building would be unsafe and it would be useless for the respondent to continue with the works of the other

parts of the building. It is clear to me that the reason for the appellant's contention that the other works should continue was to shift the blame on the respondent on the ground that there was delay and to justify their asking the respondent to agree to the termination agreement since the reasons to terminate on the ground that the piling works were defective and not up to standard was found to be baseless after the result of the tests was made known. It is also clear to me that there was no justification for the appellant to give the order to stop work. I shall deal with this later.

In respect of the order to stop work, the memo was given by Encik Yussof Ahmad to the appellant's site manager on 29 January 1990 but for reasons best known to the appellant, it was only conveyed to the respondent by a memo dated 29 March 1990 which was received by the respondent only on 31 March 1990. No reason was given as to the delay in conveying the memo to stop work to the respondent. It is pertinent to refer to the two memos. The first memo was from Encik Yussof Ahmad to Mr. Siow Chut Mun dated 29 January 1990 which read:

RE: SHAH ALAM VOCATIONAL SCHOOL
PILE – DRIVING WORKS AND RECORDS

I refer to our discussion at the Site Office this morning in respect of the above-mentioned and wish to confirm my verbal instruction.

With immediate effect, and subject to further notice, please take the following action:

1) Stop all the stripping work on the driven piles.

2) Suspend all work on all pile caps.

3) For all new pile driving works, please use the KJI's recommended formats and procedures. Records are to be in duplicates and fully verified by the Project Manager. Originals are to be returned and only duplicates are to be kept by the Contractor.

4) Markings on the pile should follow normal procedures i.e.:

0' – 30', 20' – 40', 40' – 60' etc.

Thank you.

Sgd.
Yussof Ahmad

The memo dated 29 March 1990 from Mr. Siow to Mr. Siah/Mah for the respondent stated as follows:

Like to extend to you a copy of the letter from En. Yussof that was faxed to me (Fax Ref. No. F469/90)

Please follow all instructions as stated in the said letter.

Thank you.

It is clear from the first memo that the order to stop work was with immediate effect. I could not find any record when the respondent actually stopped work but from the first memo it is apparent to me that the respondent had to stop work on 29 January 1990. As such I shall take that date to be the date that the respondent stopped work pending the outcome of the test.

The evidence shows that as on 29 January 1990 there was no complaint by the appellant of any delay in respect of the works of the respondent. This could be seen from the interim payments made by the appellant in respect of those works done. The first claim made by the respondent was on 14 August 1989 accompanied by the certificate by the architect, Abdullah Bakri Berakan Sdn Bhd. Payment was only made some two months later. Due to the delay in receiving the payment, the respondent wrote a letter dated 20 October 1989 to the appellant requesting for an advance in the sum of RM2,607,068 to help them to purchase materials for the construction of the building. The appellant did not respond to that letter. On 9 November 1989, the respondent wrote another letter to the appellant requesting for the advance. The appellant responded by a letter dated 13 November 1989 refusing the request on the ground that the sub-contract did not provide for such advance. On 16 November 1989 the respondent appealed against the refusal. The reply in respect of this was a letter from the appellant refusing the advance but were willing to supply the necessary materials from their sources on credit.

On 9 January 1990 the respondent made a claim for interim payment No. 3. This claim was forwarded to the Ministry of Education with all the necessary recommendations on the part of the appellant to pay. Up to that date there was still no complaint by the appellant of any delay in respect of the respondent's works which, in my view, were mainly piling indicating that up to that date the progress of the works of the respondent were in accordance to schedule under the sub-contract. On 2 February 1990 the appellant wrote to the respondent stating that the appellant would assist the respondent in purchasing materials required by the respondent. By a letter dated 7 February 1990, the respondent accepted the offer on condition that the cost of those materials should not exceed those from their own sources and by the same letter the respondent sought the appellant's assistance to secure the purchase of 24,000 tonnes and 15,000 tonnes aggregates sand. By a letter dated 6 March 1990

the appellant conveyed their refusal to assist. On 29 March 1990 the respondent received the memo instructing them formally to stop and suspend their works as I have stated earlier.

As can be seen from the memo the stop-work order was made due to the allegation of defective and not up to the standard piling works and there was no allegation of any delay at all. It is interesting to note that when the respondent presented their claim for the third interim payment on 9 January 1990 there was no complaint or allegation by the appellant of the piling works being defective or not up to the standard. In fact, the site architect issued a certificate and recommended payment to be made which were duly sent to the Ministry of Education. There was no dispute that the third interim payment was made. The allegation of the piling works were defective and not up to the standard apparently came from Encik Yussof Ahmad, an officer from the main office of the appellant and not from the site manager or the site architect who was supervising the works of the respondent. I came to this conclusion because the evidence shows that the site architect was asked to conduct tests in respect of the piling works only in March 1990. The tests set out by the architect were then sent to the appellant's consultant. It is puzzling that the allegation of the piling works being defective and not up to the standard came from a person in the main office and not from the site manager or the site architect. I cannot help thinking that the allegation was made to enable the appellant to find a way out of the sub-contract.

The tests conducted by the appellant's site architect were sent to the appellant's consultant, Kumpulan Jurutera Maju Sdn Bhd. The consultant took some time to come out with the result. The consultant gave the result by a letter dated 9 July 1990 addressed to the site architect. The letter stated as follows:

9th July 1990

Abdullah Bakri Berakan Sdn
753-1, Batu 4 ½
Jalan Ipoh
51200 Kuala Lumpur

Dear Sir

CADANGAN SEKOLAH MENENGAH VOKASIONAL DI SHAH ALAM SELANGOR UNTUK KEMENTERIAN PENDIDIKAN MALAYSIA

Re: Piling Works

We refer to the above and the tests carried out by Pernas Construction Sdn Bhd for the piles driven before 26th March 1990 and where numerous discrepancies were found in the piling records.

The results of the tests showed that the piles have been driven to the length indicated in the piling records and also satisfy the technical requirements.

We therefore have no objection to the piling works carried out before 26th March 1990.

We enclose herewith two (2) copies of the Supplementary Report on the Piling Irregularities at SMV Shah Alam for your necessary action.

Yours faithfully
KUMPULAN JURUTERA MAJU SDN BHD

Sgd.
CHANG CHONG PING
Managing Director.

This letter was copied to the Ministry of Education, JUB Sekutu and the appellant. Despite the letter stating that the piling works were in order the appellant refused the respondent's request to continue and complete the construction under the sub-contract. The appellant cited the termination agreement as the ground for their refusal. In my view, the respondent was pressured to execute the termination agreement on 12 May 1990 on the allegations by the appellant that the piling works carried out by the respondent prior to 26 March 1990 were defective and not up to the standard. The result shows otherwise proving that the allegations were baseless. It is also my view that it would be only fair that the respondent be allowed to continue and complete the project. I agree with the learned trial judge that the only reason the respondent executed the termination agreement was because of the allegations.

Let me now turn to the termination agreement. It is to be noted that this agreement was executed before the result of the test was announced. Our attention was drawn to the terms and conditions of the termination agreement and also the circumstances upon which the respondent was pressured to execute that agreement. These could be seen from the many correspondences between the parties.

I took note that the order to stop work by the appellant was in fact a suspension order for the respondent not to proceed with the piling works and other connected works pending the outcome of the tests carried out on the piling works already completed. Instead of waiting for the outcome of the tests, the appellant's chief executive by a letter dated 5 May 1990 asked the respondent to enter into a mutual termination agreement. This is rather strange because the result of the tests was not known yet. The letter referred to a meeting earlier between Dr. Siah (the respondent's representative) and Encik Yussof Ahmad

(the appellant's representative). Encik Yussof Ahmad was the person who issued the stop-work memo dated 29 January 1990 and the person who made the allegations that the piling works were defective and not up to the standard. It was in his interest to extract the mutual termination agreement, lest he would be blamed for the delay because of the wild allegations made by him. This letter was followed by another letter dated 8 May 1990 which read:

> SYARIKAT RASABINA SDN BHD
> Lot 27, Jalan Inai
> (Off Jalan Imbi)
> 55100 Kuala Lumpur.
>
> Dear Sir
>
> **RE: CONSTRUCTION AND COMPLETION OF THE PROPOSED SECONDARY VOCATIONAL SCHOOL AT SHAH ALAM, SELANGOR MUTUAL TERMINATION OF SUBCONTRACT**
>
> We refer to the conversation between your Dr. Siah and our Encik Yussof Ahmad on 5th May 1990 on the abovesaid matter.
>
> We hereby confirm that you have agreed to the proposal of mutually terminating the abovesaid contract and further you have suggested that we list out the terms which are to be followed subsequent to the termination.
>
> Under the circumstances, we will give your goodselves until the 10th day of May 1990 to agree to the conditions contained in the attached draft letter. If we fail to receive your answer by 12.00 noon on 10th May 1990, we may decide unilaterally on the next course of action without reference to you. In that event, we would treat all discussions up to and including the 5th May 1990 as null and void.
>
> We hope that you extend the co-operation given thus far in this contract so that we can accomplish the objective of the contract with the least possible delay and to minimise any losses.
>
> Yours faithfully,
> PERNAS CONSTRUCTION SDN BERHAD
>
> Sgd.
> CHUA SIOW LENG
> Chief Executive.

The third paragraph clearly shows the ultimatum given to the respondent either to accept by 10 May 1990 all the conditions imposed by the appellant or face the consequences. This was followed by another letter dated 12 May 1990 spelling out the terms and conditions for the termination, which read:

RE: CONSTRUCTION AND COMPLETION OF THE PROPOSED SECONDARY VOCATIONAL SCHOOL AT SHAH ALAM, SELANGOR DARUL EHSAN
- SUBCONTRACT -

We refer to the meeting held in our office this morning between your Dr. Siah Boon Seng and our Mr. Chua Siow Leng and our letter to you dated 2nd June, 1989.

As it was agreed, we write to confirm the following:

1. That Syarikat Rasabina Sdn Bhd (SRSB) agrees to a mutual termination of the abovesaid contract as of 12/5/90, subject to the terms and conditions below.

2. That SRSB will, until the end of the abovesaid contract assist Pernas Construction Sdn Bhd (PERCON) as and when called upon for the giving of advice or for purposes of planning to expedite the completion of the project. It is mutually agreed that there shall be a joint budgeting for the completion of the project within 21 days of this mutual agreement to terminate the abovesaid subcontract and in the event it shows a loss as compared to PERCON's contract prices, then, SRSB will have to bear the loss to the extent of their Performance Bond.

3. That SRSB will bear the cost of investigation of the suspect pile works on the site and for the cost of any remedial works as directed by the consultant. SRSB shall be informed on the method, magnitude and cost of investigation and remedial works. SRSB will be given the chance to rectify the defects within a reasonable period as specified by PERCON, failing which PERCON would proceed to do the works on SRSB's behalf without further reference to SRSB.

4. That SRSB will bear the cost of any defective works (other than piling) as instructed by the Consultant for any works done on or before 24/4/90. The list of defects must be given to SRSB and SRSB must first be given the chance to rectify the defects within a reasonable period as specified by PERCON, failing which PERCON would proceed to do the works on SRSB's behalf without further reference to SRSB.

5. That SRSB shall be responsible for all payments due for work done or material supplied at their request by their sub-contractors or suppliers at the project site as of 24/4/90. SRSB will resolve all these payments with the sub-contractor and suppliers directly.

6. However, PERCON will advance payment on SRSB's request to the piling sub-contractor and this will be charged to SRSB's account. If this advance cannot be recovered from any monies to be due to SRSB, then PERCON can utilise the Performance Bond for this purpose.

7. Both parties agree to carry out a detailed review and analysis to quantify the extent of delay. No L.A.D. would be imposed on SRSB if both parties agree that the project can be completed within the original contract period with the use of proper and economical construction methods. PERCON shall not impose any L.A.D. on SRSB if upon the completion of the project, no L.A.D. is imposed upon PERCON by the Client/ Consultant.

8. It is agreed that in the event the Consultant shall confirm that the quantum of past payment for work done will be varied then the party so affected shall bear or/pay the difference.

9. It is agreed that all measurements for work done will be as of 24/4/90 and the valuation of work done except Preliminaries should follow those certified by the Consultant/Client. Preliminaries would be valued by mutual agreement. Payment (if any) from this valuation shall be subject to clause 12 hereof.

10. In the event that both parties are unable to agree to any matter referred to in Clauses 7, 8 and 9 above, the matter will be referred to an independent party mutually appointed on or before the 15th of June, 1990.

11. The performance Bond is to be held as a collateral by PERCON as a means to recover money owed by SRSB (if any) to PERCON for the Shah Alam School project. In the event SRSB is unable to pay to PERCON the amount agreed to be due and owing by SRSB to PERCON pursuant to Clauses 2, 3, 4, 6, 7, 8 and 9 above after 21 days notice have been given by PERCON to SRSB, PERCON will have the right to utilise the Performance Bond provided by SRSB for the recovery of the same and for no other.

12. In the event the quantum to be held by PERCON against SRSB is established, and SRSB has a balance after allowance for all these payment, PERCON should release all monies due to SRSB within 30 days.

13. All final measurement should be completed and mutually agreed upon within 1 week from the date of this agreement, subject to Clause 10 above.

Yours sincerely.
PERNAS CONSTRUCTION SDN BHD

Sgd.
CHUA SIOW LENG

Chief Executive

CSL/kmat

We agree to the above terms and conditions as stated above.

SYARIKAT RASABINA SDN BHD	WITNESS
NAME:	NAME:
NRIC:	NRIC:

The footnote indicated that the respondent was pressured to agree and sign to those terms and conditions contained therein. It is obvious that the respondent was not given any room to negotiate or refuse. It could be seen from the letter dated 8 May 1990 that the terms and conditions were negotiated (if you could call it) by the same Encik Yussof Ahmad. Looking at the terms and conditions stated in the letter of 12 May 1990, I am of the view that the terms and conditions were in favour of the appellant and treating the respondent as the defaulter. This could be seen from the subsequent facts that the respondent requested that they be allowed to continue with the sub-contract and offering that their sub-contractor be placed under the direct supervision of the appellant but this was refused even after the result was made known.

In my view, another reason why the appellant were insistent that the agreement be signed by the respondent on or before 10 May 1990 was that they were not to be blamed for the termination and to escape liability on the ground that the termination was mutually agreed.

From what I have stated above, I am of the view that the termination agreement was not mutually agreed. The evidence shows that the respondent were reluctant to sign the termination agreement because the result of the tests was not known yet but with the threat by the appellant the respondent had no choice but to sign it on 12 May 1990, about two months before the result was made known. For that reason, I find the termination agreement to be invalid and the learned trial judge was right to disregard the termination agreement.

I have given my view as to the reason why the appellant insisted that the respondent signed the termination agreement. With that termination agreement it was easier for the appellant to call for the performance bond on the ground that the respondent were in breach of the performance bond. Was there any breach by the respondent of the terms and conditions in that agreement? The evidence shows that soon after signing the performance bond, ie, on 23 May 1990, in compliance with the terms and conditions the respondent wrote to the appellant giving the quotations (the budget) to complete the project. The letter was addressed to Encik Borhan and read:

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKASIONAL DI SHAH ALAM, SELANGOR

We refer to our telephone conversation today and are pleased to submit herewith the Works Programme for the project for your perusal.

As discussed, the works programme proved that the works can be completed within original contract period with the use of proper and economical construction methods.

Also please find copies of our subcontractor's quotations for the works for your reference and for the purpose of project budgeting. Should you need any assistance please do not hesitate to contact us.

Thank you.

Yours faithfully,
SYARIKAT RASABINA SDN BHD

Sgd.
SIAH BOON SHI
Project Manager.

In that letter it was also stated the project could be completed within the original timeframe as stated in the contract even though at that time there was already delay caused by the stop-work order. The respondent also named the sub-contractor who was willing to complete the project within the stipulated time. In my view, this was the budget required by the agreement. On the same date the appellant wrote a letter to the respondent which read:

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKESYENAL DI SHAH ALAM, SELANGOR
– VALUATION OF WORK DONE –

Pursuant to clause 13 of our letter of Mutual Termination dated May 12, 1990, all final measurement should be completed and mutually agreed by May 19, 1990.

However, todate we are still awaiting feedback from your office to finalise this valuation.

Kindly expedite the same.

Thank you.

Yours faithfully,
PERNAS CONSTRUCTION SDN BERHAD

Sgd.
NG CHEE KIN
for Chief Executive.

Apparently, the two letters crossed. It is also noted that the respondent wrote to Encik Borhan for the appellant while the appellant's letter was written by one Ng Chee Kin on behalf of the chief executive of the appellant. The appellant's letter was in respect of finalizing the valuation of the completed works. The respondent's letter also contained the valuation which was enclosed together with the quotations which are to be found at pp. 446-453 of the appeal record.

On 31 May 1990, the respondent wrote another letter to the chief executive of the appellant which read as follows:

Dear Sir,

RE: PROPOSED CONSTRUCTION AND COMPLETION FOR SHAL ALAM VOCATIONAL SCHOOL

– JOINT BEDGETTING AS SPELT OUT IN MUTUAL TERMINATION

We refer to our various requests made to your company to forward us information/data for the purpose of joint budgetting for the Shah Alam Vocational School Project. Until today, we have not been given these information and we would be most grateful if you can extend these information to us immediately.

Thank you.

By that letter the respondent requested for the appellant's budget which had not been received by the respondent despite several requests had been made. The appellant did not reply to this letter. On 2 June 1990, the respondent wrote to the appellant which read:

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKASIONAL DI SHAH ALAM, SELANGOR

We refer to the numerous discussions with your En. Borhan and Mr. Ng Chee Kin at the site office, we are pleased to confirm the following:

a) Basing on Works Programme as submitted to you, the project can be completed within the contract time.

b) Basing on quotations as submitted by our subcontractors (copies of which have been extended to you on 23rd May 1990), the project can be completed within the contract sum. We would have no objection for our present subcontractors to work directly under you.

Thank you.

In that letter the respondent referred to the quotations submitted by them earlier in the letter dated 23 May 1990. The letter also referred to the discussions at the site office between the writer and the representatives of the appellant, namely Encik Borhan and Mr. Ng Chee Kin whereby the respondent had impressed on the appellant that the project could be completed within the original budget and the stipulated period as contained in the quotations. The respondent followed this up with another letter dated 4 June 1990 which read:

Dear Sir,

RE: TENDER FOR CONSTRUCTION AND COMPLETION OF THE PROPOSED SECONDARY VOCATIONAL SCHOOL AT SHAH ALAM

We refer to item (2) of the mutual termination letter dated 12th May 1990, our discussions with your representatives and our letters to you dated 23/5/90 and 2/6/90, we are pleased to confirm that the project can be completed within contract sum and Percon shall not incur any loss in completing the project.

We are also pleased to confirm that we have no objection for you to appoint our subcontractors directly under you.

Thank you.

By that letter also the respondent requested that they be permitted to complete the project within the original budget and time and that they had no objection to place their sub-contractor under the direct supervision of the appellant to ensure that the project would be completed in time and within the original cost. Neither the appellant nor their representatives responded to those letters even though those letters indicated that Encik Borhan and Mr. Ng Chee Kin were agreeable to the respondent's proposals.

On 12 June 1990 the appellant responded to those letters which read:

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKESYENAL DI SHAH ALAM SELANGOR DARUL EHSAN – JOINT BUDGETTING

Further to the letter of mutual termination dated 12.5.1990, we forward herewith our costing for the whole project amounting to M$26,087,933.00.

Kindly submit your costing to our office immediately for comparison.

Apparently, the respondent was not happy with that letter because they had submitted the costing in their earlier letters and meetings had been held between representatives of the parties where indication that the proposals by the respondent that they be given the opportunity to complete the construction had been agreed upon. As a result, the respondent wrote a letter dated 14 June 1990 which read:

Dear Sir

RE: TENDER FOR CONSTRUCTION AND COMPLETION OF THE PROPOSED SECONDARY VOCATIONAL SCHOOL AT SHAH ALAM

We refer to our letter dated 4th June 1990, on the joint measurement for work done.

In pursuance to item 8, 9, 10 of the mutual termination letter dated 12th May 1990. We wish to confirm that the joint valuation shows that there is no outstanding monies owe to you even base on your method of valuation. However, we disagree with your valuation on preliminaries and wish to propose that the amount shall be based on client's Quantity Surveyor's method and certification.

Thank you.

By that letter the respondent rejected the valuation and the method of arriving at the valuation used by the appellant. The respondent proposed another method of valuation. The appellant responded to the above letter by faxing the following memo to the respondent:

RE: SHAH ALAM PROJECT

We attach herewith the final summary of work done value as discussed between your En. Siah Boon Shi and our Pn. Norazizah recently.

Kindly let us have your reply by 20.6.90 failing which this revised valuation would we considered correct and final.

It is clear to me that the appellant did not even consider the proposal by the respondent and instead put it in their own revised valuation which they deemed to be final. That memo was followed up by another letter from the appellant dated 21 June 1990 which read:

> Dear Sir,
>
> **RE: CADANGAN SEKOLAH MENENGAH VOKESYENAL DI SHAH ALAM SELANGOR DARUL EHSAN – JOINT BUDGETTING**
>
> We refer to the letter of mutual termination dated 12.5.1990 and our submission of our costing amounting to M$26,087,933.00 to you vide our letter dated 12 June 1990.
>
> To-date, we have not received any response from your office with regards to this joint budgeting.
>
> Take note that should we not hear from you within 7 days from this letter, we shall consider our costing to be correct and final, and proceed to act accordingly.

That memo was in respect of the budget to complete the project. Again the appellant gave an ultimatum either to respond to the costing within seven days or else the appellant would treat the costing by them to be final. The costing was stated in the appellant's memo dated 12 June 1990. According to the respondent they received the appellant's memo dated 12 June 1990 only on 21 June 1990 which was the date the appellant wrote the letter giving the ultimatum to the respondent. This evidence could be seen from the letter written by the respondent dated 21 June 1990. There was no denial from the appellant in respect of this and no reason was given. In my view, the appellant held back the memo until the letter by them giving the ultimatum was dispatched, to show the conduct of the respondent. All these took place after the meeting of representatives of both parties. In response to the memo dated 12 June 1990, the respondent wrote the following letter which was dated 21 June 1990:

> Dear Sir,
>
> **RE: CADANGAN SEKOLAH MENENGAH VOKASIONAL DI SHAH ALAM, SELANGOR**
>
> We refer to your letter dated 12/6/90 ref. PC/PR/85/89-SC/1 which we only received today, we wish to put in record that we disagree with your Costing.

We would like to request from you the basis for the above Costing from which it is derived. We reassure you that basing on our subcontractors' quotations and discussions with your representatives, the project can be completed within the contract time and contract sum.

Thank you.

As to the appellant's letter dated 21 June 1990, the respondent replied by a letter dated 27 June 1990 which read:

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKASYENAL DI SHAH ALAM – JOINT BUDGETING

We refer to your letter ref: PC/PR/85/89-Sc/1 dated 21st June 1990 and wish to put in record the following:

1) Your costing of M$26,087,933.00 is totally unrealistic and varies greatly from the figure you have indicated during our earlier meeting. We are confident that the contract works can be completed within the contract price.

2) We have contacted your office at numerous occasions to discuss the joint budgeting but until today you have not been able to meet us.

Thank you.

On the same date the appellant responded to the respondent's letter dated 27 June 1990 and refuted para 2 of the respondent's letter:

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKASYENAL DI SHAH ALAM
– JOINT BUDGETTING

We refer to your letter SR/L 1096/PC dated 27 June 1990.

We refute your allegation that you have contacted our office on this matter. Your representative Mr. Siah Boon Shi was last present at our office on 25.6.1990 to discuss only on the valuation of work done. He was not prepared to discuss any matters related to the joint budgeting.

You have not substantiated your statement that the contract works can be completed within the contract price (your letter above refers).

Should we not receive any substantiated costing from you within the next 7 days we would maintain that our costing is correct and proceed to act accordingly.

Thank you.

The respondent's reply to this letter was dated 5 July 1990:

Dear Sir

RE: CADANGAN SEKOLAH MENENGAH VOKASYENAL DI SHAH ALAM – JOINT BUDGETTING

We refer to your letter ref: PC/PR/85/89-SC/1 dated 27th June, 1990. Please refer to our letter ref: SR/L 1087/PC dated 31st May 1990 to you.

Please note that our statement that the contract works can be completed within the contract price is based on quotations submitted by sub-contractors.

Thank you.

As I have noted earlier, the letter of the respondent dated 31 May 1990 clearly showed the quotations by the respondent's sub-contractors in details in respect of the costing. This was sent to Encik Borhan as representative of the appellant. It is puzzling that the appellant's letter stated that they had not received the costing from the respondent but by the letter dated 26 July 1990 the appellant asked for the costing to be substantiated indicating that the appellant had received the costing from the respondent. The costing by the respondent was based on the quotations by the respondent's sub-contractors who were willing to complete the project within that costing and within the timeframe given. In my opinion that was substantiation itself. It is for the appellant to show why the costing given by the respondent was not realistic but not to reject it only on the ground it was not substantiated. Despite the glaring disputes in respect of valuation and costing between the parties, the appellant through Mr. Ng Chee Kin wrote a letter dated 18 July 1990 which read:

Dear Sir,

RE: CONSTRUCTION AND COMPLETION OF THE PROPOSED SECONDARY VOCATIONAL SCHOOL AT SHAH ALAM SELANGOR DARUL EHSAN

– Mutual Agreement on Termination of Sub-contract (Valuation of Work Done up to 24 April 90)

We refer to our fax to you ref: F.782/90 on 16.6.1990 submitting the grand summary of your work done value up to 24 April 1990 (Revised – 14.6.1990).

As you have not disputed the above summary to-date, we hereby confirm that the valuation is correct and final.

Thank you.

Dr. B.S. Siah, the chief executive of the respondent, had earlier written a letter dated 4 June 1990 informing the appellant that the respondent did not agree to the valuation conducted jointly between Dr. Siah on behalf of the respondent and Encik Borhan and Mr. Ng Chee Kin on behalf of the appellant. Despite conveying the respondent's disagreement on the valuation, Mr. Ng Chee Kin insisted that the valuation by the appellant was correct and final. I could not understand by what method the respondent had to use to convince the appellant of their disagreement to the appellant's valuation, costing and the budget. In my view, the problems arose because there were too many officers of the appellant dealing with this matter and what had been done by one officer was not made known to the others resulting with the confusion of understanding simple letters from the respondent. This was reflected in the letter dated 15 August 1990 written to the appellant for the attention of Mr. Chua Siow Leng, the chief executive of the appellant which read:

We refer to your two letters dated 18th July 1990, ref PC/PR/85/89-Sc/1 but faxed to us only on the 7th August 1990. We wish to refer to the discussion with your goodself at your office on 5th May 1990 and 2nd June 1990 whereby in good faith, we have discussed your intention for Pernas Construction Sdn Bhd to manage and execute the above project yourself, in view of your company new policy. We were assured that the contract will be amicably terminated mutually as per conditions described in your letter dated 12th May 1990.

However, we regret to note that the same spirit and sincerity have not been reflected in subsequent discussions/meetings with your personnel. We wish to put on record the following events:

1) Pursuant to Item (6) your letter dated 12th May 1990, we have forwarded our piling Sub-Contractor's claim and to date the amount has not been settled fully.

2) We have made numerous appointments with your Mr. Ng Chee Kin but was later told by him that he would be resigning and was no more in charge of the project. The summarised sheet as prepared by Mr. Ng and forwarded by hand comprised wild claims and deductions leaving a negative balance of $1,488.026.09 to our Progress Claim (ie. we still owe Pernas Construction such an amount). This was disputed and bluntly rejected by our Mr. Siah Boon Shi. The same copy was faxed to us on 16th June 1990 (your fax ref. F782/90) and signed by your Encik Abd. Hadi Abd. Halim.

3) We have worked with your Project Manager, (ie on Construction Schedule) as pursuance to item (7) of your letter dated 12th May 1990. However, until to-date we have no feedback on the construction schedule/ programme from your party.

4) Your letter dated 12th June 1990 signed by Encik Abd. Hadi Abd. Halim further attempts to frustrate us by estimating the total costing for the project at M$26,087,933.00. Despite several request, we are still not able to obtain any substantiation. We have duly disputed the costing vide our letter ref: SR/L 1096/PC dated 27th June 1990. The costing is baseless and ridiculously unrealistic and was rejected by us. Please note that we are confident that the contract works can be completed within the contract price if we execute the works ourselves and also we had formed you *vide* our letter ref: SR/L 1098/PC dated 5th July 1990 that the contract works can be completed also within the contract price, basing on quotations submitted by our sub-contractors.

5) We were surprised to receive two letters (ref: PC/PR/85/89-Sc/1 dated 18th July 1990) *vide* fax only on 7th August 1990 signed by your Mr. Ng Chee Kin, attempting to confirm the scrap sheet of summary as prepared by him before he claimed that he was resigning a month ago. As our Mr. Siah Boon Shi had on several occasion, disputed the final figures in several meetings with your head office quantity surveying section, it is ridiculous that you attempt to confirm, unilaterally, that the valuation of work done up to 24th April 1990 is correct and final.

In view of the lack of sincerity and coordination among your staff in resolving the issues, we request you for following immediate action:

(a) please revoke your memo to stop work (your letter dated 29th March 1990, fax ref: F469/90) immediately. Your instruction to us to stop work had caused us several losses including loss in working time and monetary losses. We should be compensated for all these losses.

(b) immediate release of payment for our progress claim no. 3 & 4.

Whilst we appreciate your assistance in expediting the works by employing additional workforce and machineries to work on site, we are not agreeing to the cost.

When this letter was written the result of the tests had been announced which clearly showed the piling works carried out by the respondent were in order and up to the standard. Kumpulan Jurutera Maju Sdn Bhd had made known the result of the tests in respect of the piling works carried out by the respondent had satisfied the technical requirements. As such the allegations by the appellant in respect of the respondent's piling works were baseless. In my view, under normal circumstances, after the result of the tests was made known,

the appellant should have nullified the termination agreement, lifted the stop-work order and requested the respondent to proceed with the works and complete the project since their allegations had been proven baseless. Furthermore, the basis of the stop-work order had been destroyed.

But that was not the case here, instead of being apologetic for the groundless allegations made, the appellant insisted on the terms and conditions of the termination agreement be followed by the respondent. To justify the existence of the termination agreement, the appellant raised the issue of delay. This was not the basis upon which the termination agreement was executed and as such could not be the basis of the termination agreement.

Clause 2 of the termination agreement provides for joint budgeting in respect of the cost to complete the project. I have dealt with this at great length earlier where the parties could not agree to the estimated costs proposed by each party. There was no joint budget reached between the parties within 21 days, although the appellant insisted that the cost proposed by them was correct. I am of the view that when there is no agreement the parties should invoke cl. 10 of the termination agreement.

Clause 3 of the termination agreement provides for the cost of the investigation in respect of the piling works be borne by the respondent. In my view, this clause was not only unfair to the respondent who in the first place did not ask for the investigation. It was done at the request of the appellant alone to confirm their allegations in respect of the piling works carried out by the respondent. There was no evidence to show that the respondent ever agreed to the investigation be carried out and to bear the cost of such investigation except in cl. 3 which, in my opinion, was put unilaterally by the appellant. When the result showed that the allegations were untrue and baseless, the cost should, in my view, be borne wholly by the appellant or at the least be divided equally. It must be remembered that the respondent had suffered enough by the stop-work order and the termination of the sub-contract. Furthermore, there was no evidence to show that the bill for the investigation was ever presented to the respondent.

Clause 4 of the termination agreement provides for the cost to make good of defective piling works as instructed by the consultant. In view of the result of tests that the piling works were not defective and up to the standard, I am of the view that this clause does not apply. Clause 5 makes provision that the respondent are to pay for all the works carried out by the respondent's sub-contractors and the cost of materials supplied. There was no evidence to show that the respondent owed anything to their sub-contractors or to the suppliers. Clause 6 of the termination agreement provides payments by the respondent

for all advance payments made by the appellant to the sub-contractors at the request of the respondent. It is clear to me no such advances were given because the appellant refused to allow the respondent to continue with the project after the termination agreement had been executed even though the respondent requested to be allowed to continue. In my view, cls. 4 and 5 envisaged a situation where the respondent were allowed to continue, unfortunately did not happen.

Clause 7 of the termination agreement provides as follows:

> Both parties agree to carry out a detailed review and analysis to quantify the extent of delay. No. L.A.D. would be imposed on SRSB if both parties agree that the project can be completed within the original contract period with the use of proper and economical construction methods. PERCON will not impose any L.A.D. on SRSB if upon completion of the project, no L.A.D. is imposed upon PERCON by the client/consultant.

This clause shows that at the time when the termination agreement was executed there was no delay yet and as such no L.A.D. had been imposed yet on the appellant by their client or consultant.

Even assuming there was delay and L.A.D. was imposed on the appellant, I have to identify who caused the delay. The delay, if any, was the result of the stop-work order. As such the stop-work order issued was unlawful and invalid. The respondent acting upon the stop-work order suspended all works in respect of the project because the respondent took it that the stop-work order applied to all works of the respondent. The appellant denied that the stop-work order applied to all works, but it is obvious to me that the stop-work order should not be imposed in the first place. The evidence shows that the stop-work order was followed by the termination agreement. When the result of the tests was announced about five months later there was already a delay of about five months caused by the appellant's stop-work order. Despite this the respondent had shown their willingness to complete the project. In my view, if the respondent was allowed to complete the project they should be given an extension of another five months from the original date of completion. It did not happen because the appellant refused the offer on the ground that there was the termination agreement. In addition to that the appellant cited the delay as the ground of termination as I have pointed out earlier. In my view, it would not only be unjust but also unlawful for the appellant to ask the respondent to pay for any L.A.D. as stipulated by cl. 7 when the appellant was totally to be blamed for the delay.

Whatever it is, no L.A.D. had been imposed on the appellant either by the Ministry as the client or by the consultant. The appellant's counsel admitted that the Ministry of Education had given the appellant the extension of time and that no L.A.D. was imposed. As such there was no amount due from the respondent under this clause.

Clause 8 provides that in the event the consultant confirmed that the quantum of past payments for work done be varied then the party so affected should bear or pay the difference. In my view, this clause depended upon cl. 9. In the present case, no evidence had been adduced by the appellant that the consultant had issued a certificate or notice to show that the previous payments to the respondent had been varied especially to show that the respondent had been overpaid. As such there was no amount due from the respondent under this clause.

Clause 9 of the agreement provides that all measurements for work (except preliminaries) should follow those certified by the consultant/client of the appellant. From the evidence it is clear to me all the claims by the respondent whether paid or otherwise were accompanied by the consultant's certificate. It was only the appellant who refused to pay in respect of the fourth claim. Evidence shows that the respondent did reduce the claim but the appellant still refused to pay. This is the amount still in dispute and what the parties called as "valuation" in their correspondences.

In my view, cl. 10 is important and it provides as follows:

> In the event that both parties are unable to agree to any matter referred to in clauses 7, 8 and 9 above the matter will be referred to an independent party mutually appointed before the 15th of June 1990.

Clause 7 referred to is in respect of the L.A.D. imposed while cl. 8 referred to variation of past payments. As I have indicated earlier, there is no dispute in respect of those. Clause 9 referred to the valuation of work done. As I have stated above, the dispute was only in respect of the fourth claim by the respondent. As I have also stated above, one party did not agree to the valuation given by the other party. In such a case, cl. 10 should come into operation but from the evidence no third party had been appointed. There was a suggestion by the respondent to appoint a quantity surveyor but this was ignored by the appellant who insisted that their valuation was correct, conclusive and final. This is one of the amounts stated by the appellant to be due to them and proceeded to recover them under cl. 11 of the agreement. In doing so the appellant were in breach of cls. 10 and 11 of the agreement. It is clear under cl. 10 that if there is any dispute in respect of valuation under cl. 9 then it

should be referred to a third party. The failure on the part of the appellant to refer to a third party was a violation of cl. 10 and the appellant was in breach of it. The breach to cl. 11 would be discussed later.

As pointed out above, there was still a dispute between the parties under cl. 2 which is connected to cl. 10. I am wondering why cl. 2 was not included in cl. 10. It is obvious to me that the costing would be the area of dispute between the parties. From the evidence it is clear to me that the appellant would not allow the respondent to complete the project at any cost and as such they would never agree to the costing put up by the respondent. It would only be fair that the dispute should be referred to a third party and as such cl. 10 should come into operation. After all under the principal contract which was PAM formatted contract any dispute should be referred to an arbitrator. The appellant could not arbitrarily impose that the costing by them to be correct, conclusive and final. In my view, until the dispute is settled there would be no amount due to the appellant from the respondent under cl. 2.

Clause 11 of the agreement provides as follows:

> The Performance Bond is to be held as a collateral by PERCON as a means to recover money owed by SRSB (if any) to PERCON for the Shah Alam School project. In the event SRSB is unable to pay to PERCON the amount agreed to be due and owing by SRSB to PERCON pursuant to Clauses 2, 3, 4, 6, 7, 8 and 9 above after 21 days notice have been given by PERCON to SRSB, PERCON will have the right to utilize the Performance Bond provided by SRSB for the recovery of the same and for no other.

Apparently, on 24 April 1991, purportedly acting under this clause the appellant demanded from Universal Life & General Insurance Sdn Bhd the full sum under the performance bond. According to the respondent, the appellant did not give any notice of demand. The respondent came to know about this when the insurance company gave notice to the respondent to pay the full amount. When the respondent failed to pay the full amount that insurance company sued the respondent and obtained judgment in Civil Suit No. D2-22-327-94 and interest thereon.

As I have stated above, when the appellant demanded the sum under the performance bond, the amount in respect of the valuation and the costing were still in dispute. The parties had not agreed to the actual amount yet. Clause 11 clearly states that the parties must agree to the amount and not an amount arbitrarily put by the appellant. Secondly, there was no 21 days notice given to the respondent.

For those reasons, I found that the appellant, calling the amount guaranteed under the performance bond, were acting in breach of cl. 11 and the termination agreement itself, on the assumption. In view of the breach the termination agreement would be invalid and ineffective. In my view, the only defence available to the appellant was the termination agreement.

As such, I see no merit in the submission of the appellant in respect of liabilities. I could not find any fault by the learned judge in her finding of the liability against the appellant. I, therefore, confirm her decision on this.

Turning to the damages, the learned judge awarded the following to the respondent:

(i) the sum of RM379,854.51 (the amount not paid by the appellant in respect of claim for progress payments);

(ii) the sum of RM1,310,800.83 and interest at the rate of 8% from 25 April 1994 until full payment of the sum due to the insurance company;

(iii) damages for loss of business RM5,000,000; and

(iv) costs.

I agree with the order for damages in respect of (i). In respect of (ii), I would vary it to that the sum of RM1,310,800.83 and the interest ordered by the court in Civil Suit No. D2-22-327-94 and the cost therein. There is no dispute that Civil Suit No. D2-22-327-94 was in respect of the claim by the insurance company for the sum paid by the insurance company to the appellant under the performance bond.

I have difficulties in upholding order (iii). The award by the learned judge in respect of damages to the respondent's reputation was RM5 million. It was not disputed that the respondent had been incorporated not long before they were awarded the sub-contract in the present appeal. In addition to the sub-contract which is the subject matter, the respondent had been awarded one or two other contracts. As such, I am of the view the respondent was not really an established and well-known firm as yet to acquire such a reputation. It was also not disputed that the appellant had reported the respondent to the J.K.R. whereby the respondent were not given a few more contracts. As such there is evidence that the respondent's reputation had been injured but the award of RM5 million as loss of reputation was rather high. I would, therefore, reduce the award to RM500,000 only.

There is one item in the claim by the respondent which was not dealt with by the learned judge. This claim is found in para. 15(1) of the respondent's statement of claim which is a claim for damages in respect of the breach of contract. In cases of breach, this forms the nexus or the main claim by the plaintiff. I am surprised that the learned judge did not make any award or damage in respect of this which, in my view, should be the main award or damage to be given. It could be that the learned judge had merged this claim together with the claim for loss of reputation. If she had done that, then the learned judge would be clearly in error. The respondent through PW1 had led evidence in respect of this. He gave evidence (p. 223 of the appeal record) that the respondent expected to make a profit of RM3,220,000 under the sub-contract. This was based on the contractual price of RM21,481,556.66 which was marked down from the tender price of RM22,077,319.48. The marked down was done on the basis that the excess RM21,481,556.66 be paid to the appellant as the principal contractor (p. 203 of the appeal record) who won the tender in respect of the project. This was not contradicted by any evidence and I see no reason to find that to be unreasonable. In addition to that the respondent left materials worth RM395,526.92 at the site when the stop-work order was issued (p. 419 of the appeal record). The appellant did not lead any evidence to contradict this. As such that sum should be taken as to the value of the materials left when the respondent were asked to stop work. It is clear to me that those sums are general damages suffered by the respondent as a result of the breach of contract by the appellant.

There is another item which, in my view, the respondent are entitled to claim as general damages. Originally, when the stop-work order was issued it was to suspend the works of the respondent pending the outcome of the tests. Subsequently, the sub-contract was terminated where the respondent ceased to work for the appellant. There are about five months period where the works of the respondent was suspended. It is clear to me that because of the suspension, the respondent could not dismiss their workers especially the skilled one. In addition, the machineries and equipments could not be withdrawn and those had to be maintained and if they were on lease the lease had to be paid. For the suspension period, when the respondent had to maintain the workers, machineries, equipments, etc. the damages suffered by the respondent would be in the sum of RM3,700,000.

The appeal by the appellant is hereby dismissed with cost. The award by the learned judge is hereby substituted by the following:

(i) The sum of RM379,854.51 as the amount due under the fourth progressive payment and interest at the rate of 8% per annum from the date of filing of the writ.

(ii) General damages in respect of the breach of contract in the sum of RM3,700,000 and interest at 8% per annum from the date of filing the writ.

(iii) The refund of RM1,310,800.83 and interest as awarded by the court against the respondent in Civil Suit No. D2-22-327-94.

(iv) Damages as to reputation the sum of RM500,000. Interest at 8% from date of judgment.

The deposit is to be taken into account as taxed cost.

My learned brother, Hashim Yusoff JCA has seen this judgment in draft and conveyed his agreement with the reasoning and the decision therein.

Arifin Zakaria JCA:

Backgrounds Facts

By agreement in writing dated 2 June 1989 ("the sub-contract"), the defendant (the appellant before us) appointed the plaintiff (the respondent before us) to be their sub-contractor for the construction and completion of the proposed secondary vocational school at Shah Alam, Selangor Darul Ehsan. It was a term of the sub-contract that the main contract documents between the defendant and the Government of Malaysia shall be read and construed as part of the sub-contract (see pp. 280-285 Appeal Record (A.R.)). The plaintiff claimed that they have commenced works and expended workers, materials and finances on site to proceed with the works pursuant to the sub-contract. The plaintiff alleged that in breach of sub-contract, the defendant had on 31 March 1990 and without just cause or excuse, requested the plaintiff to stop further work on site and/or the sub-contract. And pursuant to an agreement dated 12 May 1990 ("the mutual termination agreement") between the plaintiff and the defendant it was agreed between the parties that by mutual consent the sub-contract be terminated and plaintiff was relieved from further performance of the sub-contract.

The plaintiff's claim against the defendant is for the sum of RM379,854.51 being balance amount due and owing by the defendant to the plaintiff in respect of progress payment for work done under the sub-contract and agreed to be paid under the mutual termination agreement. The plaintiff further claimed that the defendant had wrongfully called on the performance bond issued by Universal Life & General Insurance Sdn. Bhd. thus causing loss to the plaintiff in the sum of RM1,310,800.83 together with interest thereon, which the plaintiff had to pay to the insurance company. The plaintiff also claimed general damages for fraud and general damages for loss, damages and injury to reputation. The allegation of fraud was in the course of the trial abandoned by the plaintiff.

In their amended defence the defendant contended that it was the plaintiff who were guilty of breach of contract in that they failed to proceed with and execute the works regularly, diligently and expeditiously and voluntarily admitted to their inability to do so. The defendant claimed that the plaintiff fell way behind schedule with their works programme and the plaintiff then expressed their wish to be relieved of the contract obligations. Following several discussions and negotiations between the parties they agreed to a mutual termination agreement on the terms and conditions as contained in the letter of 12 May 1990. The defendant claimed that pursuant to cl. 2 of the mutual termination agreement the plaintiff is liable to pay the defendant for any loss suffered by the defendant for the completion of the project. By letter dated 12 June 1999 the defendant had conveyed to the plaintiff the defendant's costing showing a loss but despite several attempts, the plaintiff failed or neglected to put up a joint budgeting or to submit their costing to arrive at a mutually computed budget as provided in the mutual termination agreement. The defendant contended that by reasons of the same the defendant is entitled to call on and recover monies due from the plaintiff to the defendant from the performance bond.

In support of their case the plaintiff called two witnesses namely Mr. Siah Boon Seng (PW1) who was the Chief Executive and Managing Director of the plaintiff company and Mr. Simon Quah Seng Lee (PW2) who was the Claims Manager of Universal Life & General Insurance Sdn. Bhd. (now known as Aetna Universal Insurance Sdn. Bhd.). The defendant also called two witnesses namely En. Abd. Hadi bin Abd. Halim ((DW1) the Pengurus Pentadbir Kontrak/ Ketua Jabatan of the Defendant company and Ms. Ng Chee Kin (DW2) who was a quantity surveyor of the defendant company at the material time.

The learned judge gave judgment in favour of the plaintiff for the sum of RM379,854.51 (for work done) together with interest at the rate of 8% p.a. from 7 November 1991 until the date of full realization and the sum of RM1,310,800.83 (the insurance claim) together with interest at the rate of 8% p.a. from 25 April 1994 until full realization and the sum of RM5,000,000 as damages for loss of business. In her grounds of judgment the learned judge stated that the said award is for loss of business by the plaintiff for a period of 10 years.

Breach Of Sub-Contract

By para. 6 of the statement of claim the plaintiff contended that in breach of the terms of the sub-contract the defendant had on 31 March 1999, without just cause or excuse, requested the plaintiff to stop further works on site and/ or under the sub-contract. This is further reinforced by para. 11 of the statement of claim in which, *inter alia*, it was contended that the defendant had wrongfully terminated the sub-contract by requesting the plaintiff to stop further work on site on 31 March 1990.

From the judgment the learned trial judge agreed with the contention of the plaintiff, even though this was not stated in clear terms. This may be seen from the following passage of her judgment which reads:

> … saya berpuashati bahawa di atas imbangan kebarangkalian pihak Plaintif telah berjaya membuktikan kes mereka dan juga telah mengalami kerugian kerana kemungkiran kontrak yang disebabkan oleh tindakan-tindakan Defendan.

Is this finding of the learned trial judge supported by evidence before the court? A good starting point is to look at the content of the letter of 29 January 1990 (P8B) by which the plaintiff contended that the defendant had directed the plaintiff to stop work on the project with immediate effect. A copy of this letter was extended to Mr. Siah (PW1) by memo dated 29 March 1990 (P8A) and received by the plaintiff on 31 March 1990. The material part of the letter (P8B) reads:

> I refer to our discussion at the Site Office this morning in respect of the above-mentioned and wish to confirm my verbal instruction.
>
> With immediate effect, and subject to further notice, please take the following action:
>
> 1) stop all the stripping work on the driven piles.
>
> 2) Suspend all work on all pile caps.
>
> 3) For all new pile driving works, please use the KJ1's recommended formats and procedures. Records are to be in duplicates and fully verified by the Project Manager. Originals are to be returned and only duplicates are to be kept by the contractor.
>
> 4) Markings on the pile should follow normal procedures i.e.
>
> 0' – 30', 20' – 40', 40' – 60' etc.

From my reading of the letter I don't think it could seriously be contended that the letter had in fact directed the plaintiff to stop all works on the project. To me it is plain that the instructions or directions given in the letter relate wholly to piling work. It does not touch on any other work. It is far from saying that the plaintiff is to stop all works on the project as alleged by the plaintiff. Therefore, I agree with the defendant's submission that the plaintiff is at liberty to carry on with all other works on the project despite the letter P8B. This is further supported by PW1 himself who in cross-examination at p. 229 A.R. stated that:

The Defendant did ask us to stop work. The Defendant asked us to stop work on part of the project.

At p. 230 of A.R. he said:

The Defendant asked us to stop work on pile caps. Our other works continued on site.

And at p. 245 A.R. he explained further by saying:

The dispute arose since we were asked to stop certain piling works i.e. somewhere around March. The contractors were originally under us. These contractors were paid for the work.

The dispute included the piling works.

I agree that we were asked to stop piling works and were allowed to proceed with some aspects of other works.

We were asked to stop work not on all works.

In the Mutual Agreement there was a date specified as a cut off date i.e. the date when we were asked to stop work on the entire contract.

What are these other works is elaborated in p. 246 of A.R. where he said:

Since we were asked to stop on 29.3.90 other works were still going i.e. external work, earthwork and drainage. Also at that time work on driving pile were not being stopped.

From the above it is clearly admitted by PW1 himself, the prime witness for the plaintiff, that the effect of the letter P8B was not to stop all works but only certain works as directed in the letter; meaning to say that the plaintiff could still continue with all other works despite the letter P8B. Thus, the learned judge's finding that the defendant had vide letter P8B instructed the plaintiff to cease all works on the project is against the weight of the evidence before court.

Further, if the defendant had, by letter P8B, in fact instructed the plaintiff to stop all works as alleged by the plaintiff then what is the need for the parties to enter into the mutual termination agreement of 12 May 1990 (P9). Had the plaintiff taken the stand that the defendant had wrongfully terminated the sub-contract, obviously when confronted by the mutual termination agreement the proper thing to do is to dismiss the same on the premise that the sub-contract had already been terminated. By signing the mutual termination agreement the plaintiff by implication acknowledged that the sub-contract still subsist at the material date. Thus judging from the letter P8B, the mutual termination

agreement, the evidence of PW1, and conduct of the plaintiff, I am of the firm view that the letter P8B did not seek to terminate the sub-contract between the plaintiff and the defendant. On that premise the finding of the learned trial judge that the letter P8B had the effect of terminating the sub-contract is erroneous and, therefore, ought to be set aside. Flowing from that the next point to consider is the effect of the mutual termination agreement.

The Mutual Termination Agreement

The mutual termination agreement can be found at pp. 437 to 439 of A.R. (P9). This is a letter from the plaintiff addressed to the defendant referring to an earlier meeting at the office of the defendant between Dr. Siam Boon Sang (PW1) and Mr. Chula Sow Lang of the defendant company. At the bottom of p. 439 of A.R. PW1 had put his signature on the document on behalf of the plaintiff signifying the plaintiff's agreement to the terms and conditions stated therein.

In the pleadings before us it was never contended that the plaintiff was forced or coerced into signing the mutual termination agreement and neither is there any evidence before the court to support such a contention. It is trite law that parties are bound by their pleadings. (See *State Government of Peak v. Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v. Abdullah bin Mohd. Zain* [1989] 3 MLJ 313.) PW1 in his evidence confirmed that he signed the mutual termination agreement on behalf of the plaintiff and he did not for one moment suggest that he was in any manner forced by the defendant into signing the agreement. The learned trial judge had rightly not made any finding on this. In fact no challenge on the validity of the agreement was ever made by the plaintiff before the learned trial judge.

In law a contract that is executor on both sides, that is to say where neither party has performed the whole of its obligations under it, as in the present case, may be rescinded by mutual agreement. (See *Morris v. Barron & Co.* [1918] AC 1, *Ross & Frank Co. v. J.R. Crompton & Bros. Ltd.* [1925] AC 445). The effect of such a rescission was stated by Lord Dunedin in M*orris v. Barron (supra)*:

> The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with same subject matter as the first but in a different way, it is impossible that the two should be both performed.

By para. 1 of the mutual termination agreement it is unequivocally stated that the plaintiff agrees to a mutual termination of the sub-contract of 12 May 1990 subject to the terms and conditions set out therein. The effect of this is that the sub-contract is thereby rescinded and the parties from thereon are bound by the terms and conditions of the mutual termination agreement. Henceforth, if any claim should arise between the parties it is governed by the mutual termination agreement and not by the sub-contract which had expressly been rescinded by mutual consent. In other words, after having signed the mutual termination agreement the parties are no longer bound by the sub-contract and hence no action can be brought on the sub-contract. From the pleadings it would appear that the plaintiff was relying on both the sub-contract and the mutual termination agreement. As was stated by Lord Dunedin in *Morris v. Barron & Co. (supra)* the first contract is got rid of by the second contract either by express words (as in the present case) or because the second deals with the same subject matter as the first in a different way. Therefore, after having signed the mutual termination agreement parties are no longer bound by the sub-contract.

With that as background, I shall proceed to consider the plaintiff's claim under the respective headings.

The claim for the sum of RM379,854.51 for the work done

This claim is contained in para. 8 of the statement of claim which states:

> 8. The Plaintiff's claim against the Defendant is for the sum of $379,854.51 being the balance amount due and owing by the Defendant to the Plaintiff in respect of progress payment and work done under the sub-contract agreement and agreed to be paid pursuant to the mutual termination agreement.

The learned judge allowed this claim. Her reasons for allowing this head of claim appear at pp. 7 and 8 of the grounds of judgment, which reads:

> Saya juga berpendapat bahawa Defendant hendaklah membuat bayaran kemajuan keempat yang berjumlah RM379,854.51 kepada Plaintif kerana kerja-kerja yang telah dilakukan seperti yang terdapat di dalam kontrak tersebut. Keterangan yang ada menunjukkan bahawa pembayaran kemajuan dari tahap satu hingga tiga tidak menimbulkan apa-apa bantahan mahupun dipertikaikan oleh pihak Defendan. Malah sijil-sijil bayaran yang dikeluarkan oleh Jurutera Perunding turut diakui dan telah diterima oleh pihak Defendan. Saya tidak nampak apa-apa perbezaan tentang kaedah pengiraan yang digunakan oleh Plaintif bagi bayaran kemajuan sama ada untuk tahap satu mahupun tahap keempat. Apa yang diperhatikan di sini bahawa Plaintif telah mengikuti kaedah yang digunakan oleh Perunding Projek dan Jurukur Bahan sepertimana yang terdapat dalam sijil Arkitek.

Pemerhatian Mahkamah juga mendapati wujudnya kesungguhan dan kesanggupan Plaintif di dalam percubaan mereka untuk menyelesaikan masalah mereka dengan pihak Defendant secara rundingan dan tolak ansur. Sebagai contoh, apabila jumlah asal yang dituntut oleh Plaintif sebanyak RM697,592.63 dipertikaikan oleh Defendan, Plaintif telah membuat kajian semula dan kemudiannya mengemukakan jumlah yang lebih rendah iaitu RM379,854.51 berdasarkan pengiraan yang terdapat di Eksibit 'P-31'.

It is common ground that this claim relates to the 4th progress claim. The defendant contended that the award of RM379,854.51 was contrary to the terms of the mutual termination agreement which clearly provides the procedure to be followed in determining the actual amount due to the plaintiff. DW1 in his evidence stated that for progress claim No. 4 the amount is to be determined according to actual measurement of work done. This, he said is in accordance with the mutual termination agreement. In cross examination PW1 also confirmed that the progress claims were not made on the assumption that work was done on schedule. He said they were made according to the measurements on site. He also said the initial amount claimed by the plaintiff was RM697,592.63, this was later reduced to RM379,854.51. Still the defendant did not agree. According to cl. 9 of the mutual termination agreement all measurements for work done will be as of 24 April 1999 and the valuation of work done except for preliminaries should follow those certified by the consultant. Rightly the works, which are the subject of this claim, should have been measured in accordance with this clause and in the event the parties could not agree on the measurement of the work done then the matter will be referred to an independent party mutually appointed by them as per cl. 10. As stated by PW1 until December 1990 there was no attempt to appoint an independent party to resolve this dispute.

This claim is supported by the final measurement put up by the plaintiff attached to the plaintiff's letter P31. This was followed by the plaintiff's letter of 20 December 1999 in which the plaintiff again demanded payment of the sum of RM379,854.51. The defendant did not respond to this claim by the plaintiff. The least the defendant could have done in the circumstances is to put up its own measurement. The defendant did nothing and refused to pay up on this claim.

In principle the plaintiff should be paid for work done. The plaintiff's claim here is for work done, therefore, in my view it is incumbent for the defendant to come up with its own measurement or to adduce evidence before the court to show that the final cost of the project was in fact more than the projected cost due to the fault of the plaintiff. There is no such evidence before the court.

In the circumstances I agree with the learned judge in awarding the sum of RM379,854.51 to the plaintiff and accordingly I affirm the award made by the learned judge under this head.

Call On The Performance Bond Of RM1,310,800.83 By The Defendant

This claim relates to the call made by the defendant on the insurance guarantee issued by Universal Life & General Insurance Sdn, Bhd. (P47). Arising from that, the insurance company obtained judgment against the plaintiff and four others for the sum of RM1,310,800.83 together with interest.

The learned judge allowed the plaintiff's claim for the sum of RM1,310,800.83 together with interest thereon at the rate of 8% p.a. from 25 April 1994 to the date of full payment. It is the finding of the learned trial judge that the defendant had acted in breach of the mutual termination agreement in calling on the bond. Her reasons are found in the following passage of the judgment which reads:

> Begitu juga dengan kemungkiran perjanjian penamatan bersama tersebut, saya mendapati bahawa Defendan telah memungkirinya kerana dengan secara salah telah menuntut pembayaran Bon Perlaksanaan tersebut daripada Syarikat Insuran tersebut hingga menyebabkan Plaintif mengalami kerugian apabila dipertanggungkan untuk membayar sejumlah RM1,310,800.83 termasuk faedah kepada Syarikat Insuran tersebut. Bon tersebut yang dipegang sebagai jaminan oleh Defendan hanya boleh dituntut sekiranya Plaintif gagal membuat bayaran jumlah terhutang kepada Defendan. Malah keterangan DW1 sendiri menyatakan bahawa joint budgeting tidak pernah disempurnakan atau disetujui. Oleh itu saya bersetuju dengan penghujahan bahawa Plaintif hanya akan menanggung kerugian Defendan jika sekiranya joint budgeting yang dibuat menunjukkan terdapatnya kerugian kepada Defendan.

It is common ground that no agreement on "joint budgeting" as contemplated by cl. 2 of the mutual termination agreement was ever reached between the parties. However, before the call on the performance bond is made by the defendant the provisions of cl. 11 of the mutual termination agreement must be complied with. The said clause read:

> 11. The performance Bond is to be held as a collateral by PERCON as a means to recover money owed by SRSB (if any) to PERCON for the Shah Alam School project. In the event SRSB is unable to pay to PERCON the amount agreed to be due and owing by SRSB to PERCON pursuant to Clauses 2, 3, 4, 6, 7, 8 and 9 above after 21 days notice have been given by PERCON to SRSB, PERCON will have the right to utilize the Performance Bond provided by SRSB for the recovery of the same and for no other.

Clause 11 clearly contemplates that before a call on the performance bond can be made by the defendant they must first establish that a sum of money is due and owing from the plaintiff to the defendant in respect of the said project. In the event that the plaintiff failed to pay to the defendant the said sum after a 21 days notice had been given to the plaintiff then and only then is the defendant entitled to call upon the bond. The plaintiff contended that the defendant failed to satisfy both these preconditions when the call on the bond was made. As noted earlier the parties had not reached any agreement on joint budgeting as provided in cl. 2 of the mutual termination agreement.

The defendant contended that they made the call on the guarantee on the ground that the plaintiff failed to furnish them with their costing for the purpose of the joint budgeting after due notice had been given to the plaintiff. The relevant correspondences are at pp. 458 and 462 of the A.R which for ease of reference are reproduced below:

June 12, 1990

SYARIKAT RASABINA SDN. BHD.
No. 27, Jalan Inai,
(Off Jalan Imbi)
55100 Kuala Lumpur.

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKESYENAL DI SHAH ALAM. SELANGOR DARUL EHSAN.
– JOINT BUDGETTING.

Further to the letter of mutual termination dated 12.5.1990, we forward herewith our costing for the whole project amounting to M$26,087,933.00.

Kindly submit your costing to our office immediately for comparison.

SYARIKAT RASABINA SDN. BHD.
No. 27, Jalan Inai,
(Off Jalan Imbi)
55100 Kuala Lumpur.

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKESYENAL DI SHAH ALAM. SELANGOR DARUL EHSAN.
– JOINT BUDGETTING.

We refer to the letter of mutual termination dated 12.5.1990 and our submission of our costing amount to M$26,087,933.00 to you vide our letter dated 12 June 1990.

To-date, we have not received any response from your office with regards to this joint budgeting.

Take note that should we not hear from you within 7 days from this letter, we shall consider our costing to be correct and final, and proceed to act accordingly.

In respond the plaintiff stated that they disagreed with the defendant's costing and contended that basing on their sub-contractors quotations the project can be completed within the time and as per the contract price. This may be found in their letters of 21 June 1990, 27 June 1990, 5 July 1990 and 28 July 1990. The plaintiff's stand on the issue is summarized in their letter of 28 July 1990 which reads:

28th July 1990

The Chief Executive,
PERNAS Construction Sdn. Bhd.
Tingkat 18, Menara PNB,
Jalan Tun Razak,
50400 Kuala Lumpur.

Attention: Mr. Chua Siow Leng.

Dear Sir,

RE: CADANGAN SEKOLAH MENENGAH VOKASYENAL DI SHAH ALAM

Further to our letter to you dated 5th July 1990 (Ref. SR/L 1098/PC), we regret to note that you have not revert back to us as todate.

Please be informed that in so far as we are concern, the said project can be completed as per the contract price.

In view of the fact that we are unable to agree to the final amount to complete the project, kindly revoke your memo to us dated 29th March 1990 (Fax ref: F469/90) and let us have your instruction to proceed with the contract works.

The defendant *vide* letter of 13 April 1991 gave notice to the plaintiff to extend the insurance guarantee for a further six months failing which they will make demand on the bond. Since no extension was forthcoming a demand on the bond was made on 24 April 1991.

The plaintiff challenged the defendant's right to call on the bond on several grounds. Firstly, they said there was insufficient notice given to the plaintiff prior to the call being made. The defendant's respond to this is that they had given more than 21 days notice as stipulated in cl. 11 of the mutual termination agreement. The defendant relies on their letter of 25 June 1990 (D64) as being the requisite notice pursuant to cl. 11. There is merit to the defendant's contention. Paragraph 3 of D64 clearly stated that in the event the plaintiff failed to comply with the request, the defendant will make the call on the bond. That in my view is a sufficient notice for the purposes of cl. 11.

The second issue is with regard to the joint budgeting. The plaintiff contended that before the defendant could make a call on the bond the parties need to agree on a joint budgeting for the completion of the project and in the event it shows a loss as compared to the defendant's contract price, the plaintiff shall have to bear the loss to the extent of their performance bond. (See cl. 2 of the mutual termination agreement.) The plaintiff contended that on the date the call was made on the bond no joint budgeting had been reached between them, therefore, the defendant is not entitled to make a call on the bond.

The defendant's reply to this is that the fault lies solely with the plaintiff in failing to come up with the joint budgeting. They said the plaintiff failed to furnish the necessary costing as requested by them through their letters of 12 June 1990 (P15) and that of 21 June 1990 (D42). The plaintiff, however, contended that they had submitted their costing *vide* letter of 23 May 1990 (P10). It was put to DW1 that P10 is the costing put forward by the plaintiff for the purpose of joint budgeting. DW1 disagreed. In re-examination he explained as follow:

> A. Saya tidak setuju kerana tidak ada dokumen daripada 'sub-contractors' yang dinamakan untuk membuktikan bahawa 'sub-contractors' tersebut telah benar-benar membuat 'costing' tersebut. Ini antara sebab kenapa Defendan telah meminta Plaintif untuk memberi bukti yang boleh diterima tentang 'costing' tersebut. Apa yang kami terima adalah surat Plaintif bersama dengan satu lampiran yang Plaintif katakan adalah 'sub-contractors' quotation. Saya hanya boleh mengaku setakat itu sahaja kerana ID-11 adalah senarai yang ditaip oleh Plaintif sendiri.

And on joint budgeting he said it is the duty of both parties to work together to come to agreement on joint budgeting. In his re-examination at question 12 he stated:

> A. Saya tidak setuju bahawa kedua-dua pihak hanya perlu memberi 'costing' sahaja untuk mencapai satu jumlah kos pembinaan yang boleh diperseujui akan tetapi 'joint-budgeting' bermaksud bahawa kedua-dua pihak perlu memberi kerjasama untuk menetapkan kos tersebut. Plaintif gagal

memberi kerjasama mereka seperti yang saya katakan dalam surat saya di muka surat 184 Ikatan B (ID-42). Eksibit P16, P17 dan P18 membuktikan bahawa permintaan demi permintaan daripada Defendan tidak dibalas oleh Plaintif. Saya juga merujuk kepada eksibit P19, ID-43, P20, P22 dan P39A untuk membuktikan bahawa Plaintif gagal memberi butir-butir 'costing' kepada Defendan seperti diminta.

The other reason that prompted the defendant to make a call on the bond appears in Q&A 31 of the re-examination of DW1 which reads:

31. Q: Terangkan jawapan kamu kepada soalan 33.

A: Saya bersetuju dengan soalan 33 kerana Plaintif telah menghalang proses 'joint budgeting' apabila enggan membalas permintaan demi permintaan daripada Defendan. Pada masa yang sama, keengganan Plaintif memudaratkan Defendan kerana 'deadline' bagi sebarang tuntutan oleh Defendan daripada pihak insuran sudah hampir.

In the circumstances the defendant made the call on the bond. The question is: is the defendant justified in doing so. The learned judge said no. However, with respect to the learned judge, I am of the view that she failed to consider the provisions of cls. 2 and 11 of the mutual termination agreement. Clause 2 of the mutual termination agreement is to be read together with clause 11 of the agreement. Clause 11 provides that the performance bond is merely to be held as a collateral by the defendant to recover any money owed by the plaintiff to the defendant pursuant to cls. 2, 3, 4, 6, 7, 8 & 9 of the agreement. The defendant made the call on the bond based on their costing according to which the cost of completing the project was estimated to be around RM26,087,933. (See defendant's letter P15). Based on the estimated cost of completing the project, which was far in excess of the contract price, and the impending expiry of the bond, I am of the view that the defendant was justified, in the circumstances to call on the bond. It is to be noted, however, that this is merely the defendant's costing for the purpose of joint budgeting. It is not the actual cost of completing the project. It is a mere estimate. It should further be noted that no evidence was ever adduced by the defendant of the actual cost of the project.

As provided in cl. 11 of the mutual termination agreement the bond is to be held merely as collateral by the plaintiff as a means to recover any money owed by the plaintiff to the defendant. Therefore, for the defendant to retain the sum claimed under the bond it is incumbent upon them to satisfy the court that the plaintiff did owe them the said sum or an amount in excess thereof. The defendant failed to adduce any evidence on this except to say that their costing shows that the cost of completing the project was far in excess of the

contract price. The defendant had not adduced any evidence to show what was the final cost of the project. By the date of the trial the project had been completed. Thus the final cost could be ascertained. In the circumstances I am of the view the defendant has no right to retain the money claimed under the bond. For the above reasons the learned judge was right in ordering that the sum of RM1,370,800.83 together with interest at 8% p.a. from 25 April 1999 till date of full payment be paid to the plaintiff. The date 25 April 1999, being the date the said sum was paid over to the defendant by the insurance company.

The Sum Of Rm5 Million Awarded For Loss Of Business By The Plaintiff

The learned judge in her judgment awarded this sum under prayer (iv) of the plaintiff's claim as being general damages for loss, damage and injury to reputation. She stated her reasons as follows:

> Mengenai tuntutan Plaintif di perenggan (iv) iaitu gantirugi untuk kehilangan perniagaan Plaintif berjumlah RM5,000,000.00, peguam Defendan berhujah bahawa tuntutan tersebut tidak berdasarkan pliding dan tidak disokong oleh apa-apa keterangan dalam perbicaraan. Oleh itu ianya harus ditolak. Walaubagaimanapun saya berpendapat pihak Plaintif telah membuat tuntutan di perenggan (iv) Penyata Tuntutan mereka untuk "gantirugi am untuk kerosakan, kerugian dan juga kecederaan kepada reputasi Plaintif", dan PW1 dalam keterangannya ada menyatakan bahawa Plaintif telah dimasukkan ke dalam senarai hitam (blacklisted) dan dengan itu tidak dapat memperolehi mana-mana bon perlaksanaan yang semestinya diperlukan oleh sebuah syarikat pembinaan bagi kontrak pembinaannya. Fakta ini telah disokong oleh saksi kedua Plaintif iaitu PW2. Keterangan mereka tidak disangkal oleh pihak Defendan.

She relied on s. 74(3) of Contracts Act 1950 and the case of *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 1 All ER 997 in support of her decision. She arrived at the figure of RM5 million on the basis that the plaintiff had suffered loss of business for the last 10 years.

I am of the view that the learned Judge had erred in making this award for the following reasons. Firstly, the award was premised on the ground that the defendant had been guilty of the breach of the sub-contract in refusing to allow the plaintiff to continue with the project. As I have stated above the sub-contract was by mutual consent terminated by the parties by agreement of 12 May 1990. This agreement was voluntarily entered into by the parties and thus binding on them. It is, therefore, not open to the plaintif to revert back to the sub-contract after it had been mutually terminated. The rights and obligations of the parties from thereon are governed by the mutual termination agreement. And as I have said earlier the defendant had acted within their right in calling on the performance bond. They had not acted in breach of any agreement. The

call was made pursuant to their right under cl. 2 of the mutual termination agreement. However, the right to make the call on bond ought to be distinguished from the right to retain the sum claimed under the bond. In the circumstances, I am of the view that the defendant could not be held liable for any damage, loss or injury to reputation arising from the call on the performance bond as prayed for by the plaintiff.

Secondly, on the question of pleadings, the learned counsel for the defendant contended that the plaintiff's claim for loss of business ought to be dismissed for want of pleadings. The learned judge disagreed with him. At p. 13 of her judgment she said:

> … saya berpendapat pihak Plaintif telah membuat tuntutan di perenggan (iv) Penyata Tuntutan mereka untuk 'gantirugi dan juga kecederaan kepada reputasi Plaintif.'

It would appear that the learned judge was of the view that the claim for loss of business could come under "general damages" as pleaded under para. 15(iv) of the statement of claim.

She grounded her decision on the evidence of PW1 which stated that because of the action of the defendant in calling on the bond the plaintiff's name was blacklisted and as a result the plaintiff was unable to obtain any new contract as the plaintiff was not in a position to furnish the requisite performance bond. For this she made an award of RM5 million as being the estimated loss or damage suffered by the plaintiff for a period of 10 years.

Clearly the kind of damage claim by the plaintiff cannot fall under the category of special damage which by rule of pleading is required to be specifically pleaded. However, it has been laid down in *Perestrello E. Companhia Limitada v. United Paint Co. Ltd. (CA)* [1969] 1 WLR 570 that when the kind of damage suffered by the plaintiff was not the necessary or immediate consequence of the wrongful act complained of then the plaintiff must warn the defendant in the pleadings that the compensation claimed would extend thereto; and that the limits of the requirement were not dictated by any preconceived notions of what was general or special damage but by the circumstances of the particular case. In that case it was further held that what amounted to a sufficient averment for that purpose depended on the fact of the particular case, but a mere statement that the plaintiff claimed "damages" was not sufficient to let evidence of a particular loss which was not a necessary consequence of the wrongful act.

In the present case I am of the view that the loss of business for a period of 10 years as claimed by the plaintiff clearly, could not be regarded as a necessary consequence of the alleged breach of the agreement by the defendant. Therefore, this alleged loss of business by the plaintiff ought to have been pleaded by the plaintiff before evidence could be led on the same. In the pleadings before the court there was no mention of any loss of business, therefore, it is contrary to the rule of pleadings to allow such evidence to be adduced. It is, therefore, my view that the learned judge had erred in law in allowing such evidence to be adduced and to go on making an award based on the said evidence.

Thirdly, I am of the view that the plaintiff's claim under this head also failed for want of proof. It is trite law that in a claim for damages, the burden is on the party claiming such damage to prove the same. As stated by L. Goddard CJ in *Bonham – Carter v. Hyde Park Hotel* [1948] 64 JLR 177 at p. 178 – "Plaintiffs must understand that, if they brings action for damages it is for them to prove their damages. It is not enough to write down particulars and so to speak, threw at the head of the court saying: 'This is what I have lost. I ask you to give me these damages. They have to prove it.' " This case was referred to and approved by the Federal Court in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd.* [1995] 1 CLJ 15. And in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn. Bhd.* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 Edgar Joseph J (as he then was) observed:

> It is axiomatic that a Plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither; the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v. William*). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. (See, for example *Dixon v. Deveridge* and *Twyman v. Knowles*.

It is with the above principles in mind I now turn to examine the evidence before the court. PW7 in his evidence at p. 222 stated:

> As a class A contractor we can tender for government contracts for amounts of RM10 million and above. By the Defendant calling upon the Bond it resulted in our company being blacklisted in obtaining the Performance Bond market.

And at p. 233 of the A.R. he explained further:

> All government contracts and tender require Performance Bonds or guarantees. If we cannot obtain the Bond, we cannot enter into the tender. That's why our company is dormant till now.

Those were the evidence before the court relating to loss of business allegedly suffered by the plaintiff. There is no allegation whatsoever that the plaintiff had suffered a loss of RM5 million over a period of ten years. The figure RM5 million for the first time appeared in the submission of learned counsel for the plaintiff which reads:

> (d) Selanjutnya, Plaintif juga telah mengalami gantirugi dari kerugian dan kehilangan perniagaannya yang dianggarkan secara konservatif pada tahap RM5,000,000.00.

(See page 143 A.R.)

Obviously this is merely a statement from the Bar table. This is no evidence.

For the above reasons I am of the view that award of RM5 million for loss of business is highly unjustified, as it is neither supported by the pleadings nor by the evidence before the court. I, therefore, allowed the appeal against the order of the learned judge in this regard and order that the award of RM5 million for loss of business be set aside.

On the question of cost, since the defendant succeeded in only part of the appeal I would award half cost of this appeal to the defendant. Deposit to be refunded to the defendant.